

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN SHIRLEY, individually and as trustee of the John F. Shirley and Julie E. Shirley 2003 Trust, and JULIE SHIRLEY, Plaintiffs, v. WACHOVIA MORTGAGE FSB and WELLS FARGO BANK N.A., Defendants.

) Case No. 10-3870 SC  
) ORDER RE: PLAINTIFFS'  
) MOTION TO REMAND AND  
) DEFENDANT'S MOTION TO  
) DISMISS

**I. INTRODUCTION**

Before the Court are two motions. Defendant Wachovia Mortgage ("Defendant")<sup>1</sup> filed a motion to dismiss this action. ECF No. 5 ("Def.'s MTD"). Plaintiffs John and Julie Shirley ("Plaintiffs") filed a motion to remand this action to state court. ECF No. 11 ("Pls.' Mot."). Plaintiffs also filed an Amended Complaint, which Defendant asks the Court to disregard as untimely filed. ECF No. 12 ("Am. Compl."). For the following reasons, the Court DENIES Defendant's MTD, DENIES Plaintiffs' Motion, and accepts the filing of Plaintiffs' Amended Complaint.

---

<sup>1</sup> While Plaintiffs' initial complaint named Wachovia Mortgage FSB and Wells Fargo Bank N.A. separately as Defendants, Wachovia Mortgage claims it was formerly known as Wachovia Mortgage FSB and is now a division of Wells Fargo Bank N.A. See Def.'s MTD at 1. Thus, this Order refers to the above entity or entities in the singular as "Defendant."

1       **II. BACKGROUND**

2       Plaintiffs filed this action in California state court on July  
3       26, 2010, seeking rescission of a mortgage loan transaction due to  
4       alleged violations of the Truth in Lending Act by Defendant, as  
5       well as declaratory and injunctive relief. See ECF No. 1 Ex. A  
6       ("Compl."). Defendant was served with the state court complaint on  
7       July 28, 2010, and on August 30, 2010, Defendant removed the action  
8       to federal court, citing 28 U.S.C. §§ 1331 and 1332 as bases for  
9       this Court's jurisdiction. See ECF No. 1 ("Notice of Removal") at  
10      1-2. On September 3, 2010, Defendant filed its MTD.

11       On September 13, 2010, the parties stipulated to, and the  
12      Court approved, a continuance of the hearing on Defendant's MTD.  
13      ECF No. 7 ("Sept. 13, 2010 Stip. and Order"). The parties claimed  
14      that this continuance was necessary to accommodate ongoing  
15      settlement discussions. Id. The hearing, originally set for  
16      October 8, 2010, was continued to November 15, 2010. Id.

17       Because Civil Local Rule 7-3 requires an opposition to be  
18      filed and served twenty-one days before the hearing date on the  
19      motion, the continuance of the MTD hearing also continued  
20      Plaintiffs' deadline to file their opposition. However, Plaintiffs  
21      did not file an opposition by the new October 25, 2010 deadline,  
22      nor have they since filed an opposition. Rather, on October 27,  
23      2010, Plaintiffs filed an Amended Complaint and a Motion to Remand.  
24      On November 9, 2010, Plaintiffs requested that the Court vacate the  
25      upcoming hearing on Defendant's MTD, which Defendant opposed. ECF  
26      Nos. 13 ("Pls.' Req. to Vacate Hearing"), 14 ("Opp'n to Pls.' Req.  
27      to Vacate Hearing"). The Motion to Remand is now fully briefed.  
28      ECF Nos. 16 ("Opp'n to Pls.' Mot."), 17 ("Pls.' Reply").

1       **III. DISCUSSION**

2       **A. Plaintiffs' Motion to Remand**

3           In their Motion to Remand, Plaintiffs challenge the removal of  
4       the action from state court on procedural grounds. Pls.' Mot. at  
5       2. Plaintiffs argue that under 28 U.S.C. § 1446(b), Defendant's  
6       Notice of Removal should have been filed within thirty days of  
7       service of the complaint. Id. Plaintiffs argue that because  
8       Defendant was served with the original complaint on July 28, 2010,  
9       § 1446(b)'s removal deadline was August 27, 2010, and thus the  
10      Notice of Removal's August 30, 2010 filing was untimely. Id.

11           Defendant argues that Plaintiffs' Motion to Remand was itself  
12       untimely filed under 28 U.S.C. § 1447(c), and thus Plaintiffs have  
13       waived any non-jurisdictional challenge to Defendants' removal.

14       See Opp'n to Pls.' Mot. at 2. Section 1447(c) provides: "A motion  
15       to remand the case on the basis of any defect other than lack of  
16       subject matter jurisdiction must be made within 30 days after the  
17       filing of notice of removal under section 1446(a)." 28 U.S.C. §  
18       1447(c). The Motion to Remand was filed on October 27, 2010, more  
19       than eight weeks after the August 30, 2010 Notice of Removal.

20           Plaintiffs claim that the parties agreed to toll the deadline  
21       to file Plaintiffs' Motion to Remand for at least thirty days to  
22       accommodate ongoing settlement negotiations. See Pls.' Req. to  
23       Vacate Hearing at 2. Plaintiffs claim that this agreement was  
24       memorialized in the September 13, 2010 Stipulation and Order. Id.  
25       Defendant denies that any such agreement existed, and argues that  
26       the Stipulation and Order is silent on the issue of tolling the  
27       remand deadline. Opp'n to Pls.' Mot. at 3.

28           Having reviewed the Stipulation and Order, the Court agrees

1 with Defendant that it does not evince, or even imply, an agreement  
2 between the parties to toll the remand deadline. As such, the  
3 Court DENIES Plaintiffs' Motion to Remand as an untimely procedural  
4 challenge to removal under 28 U.S.C. § 1447(c).

5       **B. Defendant's Motion to Dismiss**

6 Plaintiffs did not file an opposition or statement of non-  
7 opposition to Defendant's MTD. Rather, they filed an Amended  
8 Complaint on October 27, 2010. Plaintiffs argue that this filing  
9 supersedes the original complaint, and thus Defendant's motion to  
10 dismiss the original complaint should be denied as moot. See Pls.'  
11 Req. to Vacate Hearing at 1-2.

12 Defendant argues that Plaintiffs' Amended Complaint was not  
13 timely filed, and should be disregarded. Opp'n to Pls.' Req. to  
14 Vacate Hearing at 2. Defendant argues that under Rule 15(a) of the  
15 Federal Rules of Civil Procedure, a party may file an amended  
16 complaint once without leave of the court if it is filed within  
17 twenty-one days of service of a Rule 12(b) motion. Id. Defendant  
18 argues that because Defendant's MTD was filed on September 3, 2010,  
19 Rule 15(a)'s twenty-one-day window to amend the complaint closed on  
20 September 24, 2010, and so the Amended Complaint -- filed on  
21 October 27, 2010 -- is untimely. Id.

22 While Defendant asks the Court to strictly apply the Rule  
23 15(a) twenty-one-day deadline, Rule 15(b) states: "The court should  
24 freely give leave [to amend a pleading] when justice so requires."  
25 Fed. R. Civ. P. 15(b). When served with a Rule 12(b) motion, a  
26 plaintiff usually has a choice: file an opposition, a statement of  
27 non-opposition, or, if an amended complaint has not yet been filed,  
28 an amended complaint. Civil Local Rule 7-3(b) ordinarily gives a

1 plaintiff fourteen days to file an opposition, and Rule 15(a) gives  
2 the plaintiff twenty-one days to file an amended complaint. The  
3 parties sought a continuance of the hearing date to conduct  
4 settlement negotiations. If the stipulation continuing the hearing  
5 date were interpreted to extend Plaintiffs' deadline to file an  
6 opposition but not the deadline to file an amended complaint,  
7 Plaintiffs would be denied this choice.

8 However, even if the Court were to find that the September 13,  
9 2010 Stipulation and Order tolled the Rule 15(a) deadline,  
10 Plaintiffs' Amended Complaint would still be filed two days after  
11 the new deadline. Despite the untimely filing of Plaintiffs'  
12 Amended Complaint, the Court will accept its filing for practical  
13 reasons. If the Court disregarded Plaintiffs' untimely amendment,  
14 Defendant's MTD would be unopposed, and the Court would have two  
15 options: grant Defendant's MTD and dismiss the action with  
16 prejudice, or grant the MTD without prejudice and give Plaintiffs  
17 leave to file an amended complaint. The first option would  
18 conflict with this circuit's disfavor of default judgments. See In  
19 re Hammer, 940 F.2d 524, 525-36 (9th Cir. 1991) (stating the  
20 policy, in the context of Rule 60(b), of disfavoring default  
21 judgments and favoring decisions on the merits). The second would  
22 unnecessarily prolong proceedings and arrive at the same result as  
23 accepting Plaintiffs' Amended Complaint as the operative complaint.  
24 For these reasons, the Court accepts Plaintiffs' late-filed Amended  
25 Complaint. Because this Amended Complaint supersedes the original  
26 complaint, the Court DENIES Defendant's MTD as moot.

27 The Court cautions the parties that it will not tolerate  
28 future missed deadlines or violations of court rules. It also

1 stresses to Plaintiffs that their untimely filing of both the  
2 amended complaint and motion to remand has multiplied the  
3 proceedings in this case at a cost to both Defendant and the Court.  
4 A pattern of such behavior, if found by the Court to be  
5 unreasonable and vexatious, is grounds for sanctions under 28  
6 U.S.C. § 1927. Furthermore, future failures by Plaintiffs to  
7 comply with this Court's rules may result in the dismissal of the  
8 action pursuant to Rule 41(b).

9

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court DENIES Defendant Wachovia  
12 Mortgage's Motion to Dismiss and DENIES Plaintiffs John and Julie  
13 Shirley's Motion to Remand. Plaintiffs' Amended Complaint, filed  
14 on October 27, 2010, supersedes the original complaint. Within  
15 twenty-one (21) days of this Order, Defendant shall either file its  
16 Answer or a Motion to Dismiss under Rule 12(b) of the Federal Rules  
17 of Civil Procedure. The status conference scheduled for December  
18 17, 2010 in Courtroom No. 1, 17th Floor, United States Courthouse,  
19 450 Golden Gate Avenue, San Francisco, California, is continued to  
20 January 21, 2011 at 10:00 a.m. Parties shall file a joint case  
21 management statement seven (7) days prior to the hearing.

22

23 IT IS SO ORDERED.

24

25 Dated: December 2, 2010

26   
UNITED STATES DISTRICT JUDGE

27  
28